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No. 88-1482 (2)

In The Supreme Court Of The United States

OCTOBER TERM, 1988

THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA,

Petitioner,

vs.

ANR PIPELINE COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT WILLIAMS NATURAL GAS COMPANY IN OPPOSITION TO THE PETITION

WILLIAMS NATURAL GAS COMPANY

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QUESTION PRESENTED

Is the State of Oklahoma preempted by the Supremacy Clause of the Constitution of the United States and by the Natural Gas Act of 1938 and the Natural Gas Policy Act of 1978 from requiring an interstate pipeline company to make ratable purchases of natural gas from all producers of natural gas who tender gas for purchase?

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BRIEF FOR RESPONDENT WILLIAMS NATURAL GAS COMPANY IN OPPOSITION TO THE PETITION

Respondent Williams Natural Gas Company ("Williams")[1] submits the following brief in opposition to the Petition for writ of certiorari filed by the petitioner, Oklahoma Corporation Commission. Petitioner has accurately listed the parties to this proceeding, has given appropriate references to the opinions and judgment delivered in the courts below, and has identified the correct statutory basis for jurisdiction in this Court.

[1]Williams is the wholly-owned subsidiary of Northwest Energy Company, a wholly-owned subsidiary of The Williams Companies, Inc.

CONSTITUTIONAL PROVISION

The Supremacy Clause of the Constitution of the United States reads as follows:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof *** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Art. VI, cl. 2.

STATUTORY PROVISIONS

In addition to the statutes reproduced by petitioner in Appendix D to the Petition, the provisions of the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432, are pertinent to this proceeding. Appendix A hereto contains the additional pertinent statutory provisions.

STATEMENT

In 1915, the State of Oklahoma enacted a statute governing the purchase of natural gas within the state. This statute, codified as Okla. Stat. tit. 52, § 240, directs each purchaser of natural gas in Oklahoma to purchase all natural gas offered to it "without discrimination in favor of one producer as against another, or in favor of one source of supply as against another." *Ibid.* This statute imposes what is commonly referred to as a "ratable take" requirement.

Pursuant to this Statute, on October 19, 1983, the Corporation Commission of the State of Oklahoma (the "Commission") adopted its Rule 1-305, which purports further to govern the purchase of natural gas within the State of Oklahoma. This Rule modified the "ratable take" rules of Oklahoma by establishing a priority system of natural gas purchases within the State. Under Rule 1-305, each purchaser is to first purchase all of the gas that it needs from "hardship and distressed" wells. If more gas is still required, the purchaser must then purchase all the gas that it needs from "enhanced recovery" wells. If more gas is still needed, it is then to be purchased from "casinghead gas and associated gas" wells. Finally, if more gas is needed, it is to be purchased from all other wells proportionally to their allowables ("ratably").

Both Okla. Stat. tit. 52, § 240 and Rule 1-305 purport to prescribe requirements for the purchase of natural gas applicable to "[e]very person, firm or corporation, now or hereafter engaged in the business of purchasing and selling natural gas in this state * * *." Okla. Stat. tit. 52, § 240. *See* Rule 1-305(a). At least since the decision of the United States Supreme Court in *Northern Natural Gas Co. v. State Corporation Commission,* 372 U.S. 84 (1963) — in which the Court held that Kansas could not constitutionally apply its "ratable take" statute to interstate pipelines — the Corporation Commission had not attempted to apply Oklahoma's ratable take requirements to interstate pipelines. On February 27, 1984, however, the Commission commenced

a proceeding, "General Cause No. 28770," for the purpose of determining whether it could constitutionally apply Oklahoma's ratable take statutes and regulations to interstate natural gas pipeline companies. On July 3, 1985, the Commission entered its Order No. 281285 in which the agency concluded that it had jurisdiction and authority to require ratable takes of natural gas by interstate pipelines.

Since July 3, 1985, the Commission has attempted to prosecute several proceedings designed to enforce the provisions of Okla. Stat. tit. 52, § 240 and Rule 1-305 against interstate gas pipeline companies[2] Interstate pipelines that failed to adhere to the requirements of the statute and the Rule faced the risk that penalties would be imposed against them under the Commission's enforcement procedures. *See* OKLA. CONST. Art. 9, § 19.

Application of Okla. Stat. tit. 52, § 240, and Rule 1-305 to Williams would require the company to readjust its purchasing practices and priorities. In fact, by its very nature, Rule 1-305 would require every interstate pipeline operating in Oklahoma to alter its purchasing decisions from whatever priority scheme formerly was employed by each company to the priority scheme now dictated by state law. For example, if a company had cheap gas available from any well that was not a "distressed" or "hardship" or "casinghead gas"

[2]*See, e.g., Grace Petroleum v. El Paso Natural Gas,* CD 103791; *Grace Petroleum v. El Paso Natural Gas,* CD 103792; *Grace Petroleum v. El Paso Natural Gas,* CD 103793; *Grace Petroleum v. El Paso Natural Gas,* CD 103794; *Grace Petroleum v. El Paso Natural Gas,* CD 103795.

well, it could not purchase *any* of that cheap gas until it first purchased *all* the "distressed" or "hardship" or "casinghead gas" available to it under Rule 1-305[3].

The district court and the court of appeals held that Rule 1-305 and the "ratable take" requirements of Okla. Stat. tit. 52, § 240, cannot constitutionally be applied to interstate pipelines such as Williams. The courts below, relying on *Northern Natural Gas Co. v. State Corporation Commission, supra,* and *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board,* 474 U.S. 409 (1986), held that the State's purchase priority scheme was preempted by the federal regulatory scheme established by the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq.,* and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3301 *et seq.*

REASONS FOR DENYING THE WRIT

1. This Court has twice held that state ratable take laws cannot constitutionally be applied to interstate pipelines that are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission. *See Northern Natural, supra,* 372 U.S. at 91-93; *Transcontinental, supra,* 474 U.S. at 422-424. In so ruling, the Court has twice specifically rejected the claim that the state's admitted authority to regulate produc-

[3]Petitioner asserts that state regulation of pipeline purchase priorities is necessary to assure continued production from hardship, distressed and associated gas wells (Pet. at 9). In fact, however, under the open-access transportation provisions of FERC Order 500 (52 Fed. Reg. 30,334 (1987)), production from such wells can be released and transported for sale in national markets.

tion and to conserve state resources justifies such state regulation of interstate pipelines. *See Northern Natural, supra,* 372 U.S. at 93-95; *Transcontinental, supra,* 474 U.S. at 419-420. The district court and the court of appeals correctly held that the prior decisions of this court are dispositive of this case. *See* Pet. App. A, at 26-30; Pet. App. B, at 36-38. The petition for a writ of certiorari presents no new issues meriting this Court's plenary review.

2. The Court has, moreover, recently had occasion to reemphasize that state regulations directing interstate pipelines, under force of state law, to adopt specific purchasing patterns are preempted by federal regulation. As the Court explained in *Northwest Central Pipeline Corp. v. State Corporation Commission,* 57 U.S.L.W. 4302, 4307 (March 6, 1989) (footnote omitted:)[4]

> In both [*Northern Natural* and *Transcontinental*] we held state regulations requiring gas purchasers to take ratably from producers were pre-empted, because they impinged on the comprehensive federal scheme regulating interstate transportation and rates. *Northern Natural,* 372 U.S., at 91-93; *Transco,* 474 U.S. at 422-424. In

[4]In *Northwest Central,* the Court concluded that a state regulation directed at producers, rather than at pipelines, is not preempted when it has only an indirect economic effect on pipeline purchasing decisions. The Court in *Northwest Central,* however, specifically emphasized that ratable take rules imposed by states directly upon interstate pipelines that purport to mandate purchasing priorities by force of state law are preempted by the comprehensive scheme of federal regulations over interstate pipeline purchasing practices. 57 U.S.L.W. at 4308.

In the present case, the court of appeals correctly observed that the challenged state regulations are directed to, and operate coercively upon, *pipelines* rather than *producers*. Pet. App. A, at 30. They thus fall squarely within the prohibitive ambit of *Northern Natural* and *Transcontinental. See Northwest Central, supra,* 57 U.S.L.W. at 4308.

Northern Natural, we held that rateable-take orders "invalidly invade[d] the federal agency's exclusive domain" precisely because they were "unmistakably and unambiguously directed at *purchasers.*" 372 U.S., at 92 (emphasis in original). Interstate pipelines operate within the field reserved under the NGA for federal regulation, buying gas in one State and transporting it for resale in another, so inevitably the States are preempted from directly regulating these pipelines in such a way as to affect their cost structures. *Ibid.* Likewise in *Transco,* in which we considered whether the rule in *Northern Natural* had survived deregulation of many interstate rates by the NGPA, we held that federal authority over transportation and rates — now expressed in a determination that rates should be unregulated and settled by market forces — continued to occupy the field and to preempt state ratebale-take orders directed to pipelines and forcing upon them certain purchasing patterns. 474 U.S., at 422-424.

3. The Court has thus twice ruled upon the precise issue presented in this case. The Court has, moreover, emphasized the continuing validity of these rulings in an opinion entered only one month ago. There is no conflict of authority among the lower courts nor any other reason presented to justify further review of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HALL, ESTILL, HARDWICK,
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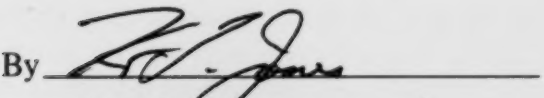
By 

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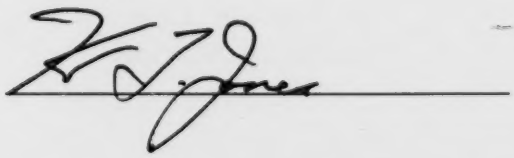

APPENDIX A

FEDERAL STATUTORY PROVISIONS

1. Section 1 (b) of the Natural Gas Act, 15 U.S.C. § 717 (b):

> (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation for sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

2. Section 601 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3431:

> (a) Jurisdiction of Commission under Natural Gas Act. —
>
> (1) Sales. —
>
> (A) *Natural gas not committed or dedicated.* — For purposes of section 1 (b) of the Natural Gas Act, effective on the first day of the first month beginning after November 9, 1978, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of November 8, 1978, solely by reason of any first sale of such natural gas.
>
> (B) *Committed or dedicated natural gas.* — Effective beginning on the first day of the first month beginning after November 9, 1978, for purposes of section 1 (b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely

by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of November 8, 1978, and which is —

(i) high-cost natural gas (as defined in section 3317 (c), (1), (2), (3), or (4) of this title);

(ii) new natural gas (as defined in section 3312 (c) of this title); or

(iii) natural gas produced from any new, onshore production well (as defined in section 3313 (c) of this title).

(C) *Authorized sales or assignments.* —
For purposes of section 1 (b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas —

(i) authorized under section 3362 (a) or 3371 (b) of this title; or

(ii) pursuant to any assigned authorized under section 3371 (a) of this title.

(D) *Natural-gas company.* —
For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2 (6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

(E) *Alaskan natural gas.* —
Subparagraph (B) (ii) and (iii) shall not apply with respect to natural gas produced from the Prudhoe Bay unit of Alaska and transported through the

transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(2) Transportation. —

(A) *Jurisdiction of the Commission.*
For purposes of section 1 (b) of the Natural Gas Act the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is —

(i) pursuant to any order under section 3362 (c) or section 3363 (b), (c), (d), or (h) of this title; or

(ii) authorized by the Commission under section 3371 (a) of this title.

(B) *Natural-gas company.*
For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2 (6) of such Act) shall not include any person by reason of, or with respect to, any transportation of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission under the Natural Gas Act do not apply to such transportation by reason of subparagraph (A) of this paragraph.

(b) Charges deemed just and reasonable.

(1) Sales.

(A) *First sales.* Subject to paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if —

(i) such amount does not exceed the applicable maximum lawful price established under sub-chapter 1 of this chapter; or

(ii) there is no applicable maximum lawful price solely by reason of the elimination of price controls pursuant to part B of sub-chapter 1 of this chapter.

(B) *Emergency sales.* For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized under section 3361 (a) of this title shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established under such section and applicable to such sale.

(C) *Sales by intrastate pipelines.* For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any sale authorized by the Commission under section 3371 (b) of this title shall be deemed to be just and reasonable if such amount does not exceed the fair and equitable price established by the Commission and applicable to such sale.

(D) *Assignments.* For purposes of section 4 and 5 of the Natural Gas Act, any amount paid pursuant to the terms of any contract with respect to that portion of which the Commission was authorized an assignment authorized under section 3372 (a) of this title shall be deemed to be just and reasonable if such amount does not exceed the applicable maximum lawful price established under subchapter 1 of this chapter.

(E) *Affiliated entitles limitation.* For purposes of paragraph (a), in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of such paragraph, such amount does not exceed the amount paid in

comparable first sales between persons not affiliated with such interstate pipeline.

(2) Other charges. —

(A) *Allocation.* — For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for transportation, storage, delivery or other services provided pursuant to any order under section 3363 (b), (c), or (d) of this title shall be deemed to be just and reasonable if such amount is prescribed by the President under Section 3363 (h) (1) of this title.

(B) *Transportation.* — For purposes of sections 4 and 5 of the Natural Gas Act, any amount paid by any interstate pipeline for any transportation authorized by the Commission under section 3371 (a) of this title shall be deemed to be just and reasonable if such amount does not exceed that approved by the Commission under such section.

(c) Guaranteed passthrough.

(1) *Certificate may not be denied based upon price.* — The Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.

(2) *Recovery of just and reasonable prices paid.* For purposes of sections 4 and 5 of the Natural Gas Act, the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if —

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, and

(B) such recovery is not inconsistent with any requirement of any rule under section 3341 of this title (including any amendment under section 3342 of this title),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

3. Section 602 of the NGPA, 15 U.S.C. § 3432:

(a) *Authority to prescribe lower maximum lawful prices.* — Nothing in this chapter shall affect the authority of any State to establish or enforce any maximum lawful price for the first sale of natural gas produced in such State which does not exceed the applicable maximum lawful price, if any, under subchapter 1 of this chapter.

(b) *Common carriers.* — No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation —

(1) pursuant to any order under section 3362 (c) or section 3363 (b), (c), (d), or (i) of this title; or

(2) authorized by the Commission under section 3371 (a) of this title.